APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 355—September Term, 1967.

(Argued March 18, 1968 Decided May 1, 1968.)

Docket No. 31594

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERMAN TALLER,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge,* and CLARIE, *District Judge.**

Appeal from a judgment of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* convicting Herman Taller, after a verdict, on three counts of misbranding drugs, eight counts of using the United States mails to defraud, and one count of conspiracy, under a forty-nine count indictment charging him with violations of 18 U. S. C. §§2, 371, and 1341 and of 21 U. S. C. §§331(a), 331(k), 333(b) and 352(a). Affirmed.

* Of the District Court of Connecticut, sitting by designation.

WILLIAM W. KLEINMAN (Kleinman, Gold & Landsman, Brooklyn, N. Y.; Abraham Glasser, of Counsel), *for Appellant.*

CARL GOLDEN, Ass't U. S. Attorney (Joseph P. Hoey, U. S. Attorney, Eastern District of New York), *for Appellee.*

FRIENDLY, *Circuit Judge*:

The appellant, Dr. Herman Taller, a physician who specialized in obstetrics, is the author of the 1961 million-copy best-seller, "Calories Don't Count." This book as originally planned was to be an exposition of Dr. Taller's views, arrived at after some experimentation and research and apparently held with sincerity, that obesity could be cured, without the painful necessity of restricting calorie intake, by regular ingestion of liquid oil containing poly-unsaturated fats. Dr. Taller had been prescribing three ounces of liquid safflower oil per day for his patients, and this dosage appeared in the drafts and galleys of his book. Before the book was published, however, he became involved in an enterprise organized to distribute safflower oil capsules; to create a demand for these he prevailed upon his publisher to change the text so that the recommended dosage would be six capsules per day and to indicate that these could be obtained from the new enterprise. The packages of capsules, in turn, were labelled "C D C" and contained a booklet identifying them with Dr. Taller's " 'Calories Don't Count' Weight Control Program." The revised capsule dosage contained only 1/15

as much safflower oil as the liquid oil dosage originally recommended and, as Taller later admitted, was worthless as a cure for obesity even in terms of his own theory.

Dr. Taller was tried before Judge Dooling and a jury in the District Court for the Eastern District of New York on a forty-nine count indictment. He was found "guilty as charged" on the three counts under the Food and Drug Act for feloniously causing misbranded drugs to be introduced into interstate commerce and for repacking and mislabelling drugs which had been shipped in interstate commerce, and on eight of the forty-five counts under 18 U. S. C. §1341 for using the mails to defraud; he was found "guilty as a misdeameanor" on the conspiracy count under 18 U. S. C. §371. Judge Dooling fined him $1000 each on one misbranding count and six mail fraud counts, suspended imposition of sentence on the remaining counts, and placed him on proobation for two years.

The only point raised on appeal requiring much discussion is the sense to be made of the jury's verdict finding Taller guilty of eleven substantive felonies and one "misdeameanor conspiracy." The latter finding is traceable—though not precisely responsive—to an instruction that as to the conspiracy count the jury could return a verdict of "guilty or not guilty, except that if you conclude that the defendant was guilty only of conspiring to commit the misdemeanor of one or more of . . . the Food and Drug counts, your verdict would take the form 'guilty as a misdemeanor.'"

The judge gave this charge because the second paragraph of 18 U. S. C. §371 provides that

> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

While punishment is a question for the judge rather than the jury, the quoted paragraph made it essential for the judge to know whether if the jury found Taller guilty of consiracy, it had in mind a conspiracy whose only criminal object was the commission of a misdemeanor, as would be the case if the jury decided that the only conspiracy was to misbrand without "intent to defraud or mislead." The jury apparently interpreted the instruction as permitting or requiring it to weigh the gravity of the conspiracy rather than merely to report what it found the objects to be, and, perhaps on the basis that other members may have been free of intent to mislead or defraud, concluded this was a low level conspiracy.

An instruction detailing the limited conditions under which it would have been appropriate to find defendant guilty of a conspiracy punishable only as a misdemeanor might well have reduced the likelihood of jury confusion. However, we cannot see how Taller was prejudiced by the jury's finding him guilty of conspiracy in a manner requiring a lesser sentence on that count than a consistent verdict would have demanded. Taller's suspended sentence on the "misdemeanor conspiracy" verdict was concurrent with the suspended sentences on four of the substantive counts, see *Lawn* v. *United States,* 355 U. S. 339, 359 (1958), and the evidence supporting the eleven guilty verdicts on substantive counts was ample. The verdict

on these counts was not logically impaired by the jury's confusion over "grades" of conspiracy, and even if it had been "[c]onsistency in the verdict is not necessary." *Dunn* v. *United States,* 284 U. S. 390, 393 (1932); *United States* v. *Carbone,* 378 F. 2d 420 (2 Cir.), cert. denied, 389 U. S. 914 (1967).

Appellant urges that the Eastern District of New York was an improper venue for the misbranding counts, presumably because the drugs were actually shipped from New Jersey to other states. However, the indictment charged and the proof showed that the Brooklyn-based ativity of Taller as a principal was the cause of these shipments, and *United States* v. *Bozza,* 365 F. 2d 206, 220-22 (2 Cir. 1966), thus does not assist him. The "misdemeanor conspiracy" verdict, which appellant argues flaws every facet of the conviction, is in no way relevant.

Dr. Taller also objects to the Government's introduction of expert testimony that the entire theory of his weight-reducing diet was unsound, on the ground that the issue was not raised in the indictment and that a Government attorney had conceded as much at a pre-trial conference. However, our reading of the indictment, which accords with Judge Dooling's and defense counsel's at the pre-trial conference, is that it does put the validity of Dr. Taller's theory in issue. While the Government attorney indicated that he thought otherwise, this was treated as a disagreement in the interpretation of the indictment rather than as a waiver by the Government. Furthermore, appellant did not object or request a continuance when the Government made clear in its opening statement that it would introduce such testimony, or when such evidence was actually first introduced seventeen days later.

Dr. Taller contends also that this evidence was inadmissible or was admissible only with cautionary instructions since it did not represent a "universality of scientific belief." However, this testimony "was introduced only to establish that the advertising claims made for [Dr. Taller's diet] were scientifically false and was admissible for this purpose. McCormick, Evidence §§13-15 (1954)." *United States* v. *Andreadis*, 366 F. 2d 423, 433 (2 Cir. 1966). While an instruction that proof of error in Dr. Taller's theory did not establish that his intent was fraudulent would have been proper, the failure to give one was not "plain error."

Finally, we are satisfied that the charge as to the requisite scienter for conspiracy, which appellant attacks, was adequate.

Affirmed.

Appendix B—Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. T. EMMET CLARIE,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

HERMAN TALLER,

Defendant-Appellant,

HARRY BOBLEY, *et al.*,

Defendants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B—Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

Appendix C—Statutes

18 U.S.C. § 2

§ 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. § 371

§ 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. §1341

§ 1341. FRAUDS AND SWINDLES

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

21 U.S.C. § 331 (a), (b), (k)

§ 331. Prohibited Acts

The following acts and the causing thereof are prohibited:

(a) the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

* * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

21 U.S.C. § 333 (b)

Same; with intent to defraud or mislead

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331 of this title, with intent to defraud or mislead, the penalty shall (except in the case of an offense which is subject to the provisions of the proviso to subsection (a) of this section relating to second or subsequent offenses) be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

21 U.S.C. § 352 (a)

§ 352. Misbranded Drugs and Devices

A drug or device shall be deemed to be misbranded—

False or misleading label

(a) If its labeling is false or misleading in any particular.